ruption by judicial proceedings be ingrafted on the law by rule of court, not sanctioned or made necessary by express legislation."

Intoxicating Liquor—Unlawful Sale—Jamaica Ginger.—In Commonwealth *v.* Sookey, 128 N. E. 788, the Supreme Judicial Court of Massachusetts held that the proprietor of a retail grocery store who sold in good faith to customers bottles of extract of Jamaica ginger containing 88 per cent. of alcohol for flavoring and medicinal purposes, and so labeled, did not violate Mass. Rev. Laws, c. 100, prohibiting the unlawful sale of intoxicating liquors; the definition of section 2 not including Jamaica ginger, unless shown to be a "beverage." It was further held that the court cannot take judicial notice that extract of Jamaica ginger is in fact an intoxicating beverage, and that it is generally sold and used as such.

The court said in part: "We put aside the discussion of the Prohibition Amendment to the federal Constitution, and the Volstead Act (41 Stat. 305) enacted by Congress to enforce the same, as they were not in effect at the time of the sales in question. Nor is it contended that the earlier War-Time Prohibition Act has any application. See Jacob Ruppert *v.* Caffey, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. ——. The statute that the defendants were charged with violating is R. L. c. 100, which prohibits the unauthorized sale of intoxicating liquor. It was held in the recent case of Commonwealth *v.* Nickerson, 128 N. E. 273 (Sept. 17, 1920), that this statute 'has not been abrogated by the Eighteenth Amendment and the Volstead Act. The sections under which the complaint was framed against the defendant are still operative and efficacious.' Section 2 provides as follows:

" 'Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than one per cent. of alcohol, by volume, at sixty degrees Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter.'

"Jamaica ginger is not included in this definition, unless it is shown to be a 'beverage'; that is to say, a liquor for drinking. The mere fact that it contains a large percentage of alcohol does not make it 'intoxicating liquor' within the meaning of the statute. There are numerous medical preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia (see R. L. c. 75, § 18; chapter 100, § 17, cl. 3), and many patent and proprietary medicines, toilet and antiseptic solutions, which contain much more than 'one per cent. of alcohol,' but whose use as a beverage is rendered practically impossible by reason of other ingredients. Commonwealth *v.* Mandeville, 142 Mass. 469, 8 N. E. 327; State *v.* Costa, 78 Vt. 198, 207, 62 Atl. 38; Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284.

"In this meager record there appears no evidence that the article sold was fit for beverage purposes, much less that it was ordinarily so used. No testimony was introduced as to its nature, or as to its constituent elements other than the alcohol. So far as disclosed by the agreed facts, it was manufactured solely 'for flavoring and medicinal purposes,' as the label indicated, and sold by each of these defendants to Harrington in good faith for those purposes. It would be only conjecture to infer from a single sale of Jamaica ginger, without any evidence of the possibility or extent of the use of this preparation as a beverage, that the bottle was in fact sold not as a medicine, but as intoxicating liquor. Commonwealth *v.* Ramsdell, 130 Mass. 68; Commonwealth *v.* Joslin, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449. It could not be ruled as matter of law that the mere possession by a grocer or druggist of certain well-known articles ordinarily used for medical, culinary, toilet or antiseptic purposes, and containing alcohol, makes the dealer criminally liable for the illegal keeping of intoxicating liquor, under our sfatutes. See in this connection R. L. c. 76, § 23, as amended by St. 1910, c. 172. For the more stringent provisions of the Volstead Act, see title 2, §§ 1, 4, and Regulation 60, issued under said act by the Bureau of Internal Revenue; especially see Regulations of United States Treasury Department 3092, approved November 16, 1920, with reference to extract of ginger.

"We cannot supply the lack of essential evidence in the present case by taking 'judicial notice' that extract of Jamaica ginger is in fact an intoxicating beverage, and that it is generally sold and used as such. In this jurisdiction, where licenses for the sale of intoxicating liquors have been granted under a local option system and there has been little occasion in many communities to resort to substitutes therefor, it has not become, as yet at least, a matter of common and general knowledge that ordinarily this well-known preparation is sold, not for medicinal purposes, but as a disguised substitute for liquor. In other words, that alleged fact is not so notorious that we can assume without proof that Jamaica ginger has the distinctive character, use and effect of an intoxicating liquor. As was said in State *v.* Barr, 84 Vt. 38, 41, 77 Atl. 914, 916 (48 L. R. A. [N. S.] 302):

" 'In some states the courts now take judicial notice of the properties of persimmon beer, rice beer, and potato beer; while in this state there is no such common knowledge of these things as to warrant judicial notice of them.'

"See Commonwealth *v.* Pease, 110 Mass. 412; Ann. Cas. 1914C, 874, note, 48 L. R. A. (N. S.) 302, 308, notes; Wigmore on Evidence, vol. 4, § 2582.

"Confining ourselves to the present record, we are of opinion that on the scanty facts appearing in the agreed statement the commonwealth did not go far enough to warrant a verdict of guilty and the motion of each defendant to that effect should not have been denied.

"In view of the judge's direction of verdicts of guilty, it should be added that, even if the agreed facts had warranted a finding that this Jamaica ginger was an intoxicating beverage within the meaning of our statute, that issue, being one of fact, should have been submitted to the jury. Commonwealth *v.* Hallett, 103 Mass. 452; Compton *v.* State, 95 Ala. 25, 11 South. 69; Cooper *v.* State, 19 Ariz. 486, 172 Pac. 276; State *v.* Miller, 92 Kan. 994, 1004, 142 Pac. 979, L. R. A. 1917F, 238, Ann. Cas. 1916B, 365; Bertrand *v.* State, 73 Miss. 51, 18 South. 545; Abruthnot *v.* State, 56 Tex. Cr. R. 517, 120 S. W. 478. In Mitchell *v.* Commonwealth, 106 Ky. 602, 51 S. W. 17, relied on by the commonwealth, the issue was so submitted; and in State *v.* Intoxicating Liquors & Vessels, 118 Me. 198, 106 Atl. 711, 4 A. L. R. 1128, it was stated in the opinion:

" 'The evidence shows that the Jamaica ginger could be and was used by ordinary persons as a beverage, and in such quantities as to produce intoxication, and did in fact produce intoxication.'

"Accordingly it was held to be intoxicating liquor, within the meaning of Rev. St. Me. c. 127, §§ 21, 22."

For a decision which approaches the question from a diametrically opposite point of view, see State *v.* Klein (Iowa), 174 N. W. 481, 6 V. L. R., N. S., 788.

Negligence—Attractive Nuisance Doctrine Not Applicable to Artificial Pond on Railroad Right of Way.—In Blough *v.* Chicago Great Western R. Co., 179 N. W. 840 the Supreme Court of Iowa held that a pond or barrow pit situated in a railroad's right of way being such as is common wherever railroads have been constructed, without characteristics different than natural collections of water, and without additional attraction to children or enhancement of danger, the railroad was not liable for death of a five year old child, who had wandered from home, from drowning therein, on any theory of attractive nuisance.

The court said in part: "In Kansas City *v.* Siese, 71 Kan. 283, 80 Pac. 626, a pond had been formed by placing a fill in the street across a deep ravine. An alley of the city crossed this pond. A sewer was placed in the alley by the city, and a sewer was built over and across the pond, resting in a trough supported by piling. This sort of viaduct was attractive and alluring to boys who for a long time had resorted to the place and, climbing along this pipe and trough, jumped into the water below. The artificial structure built over the pond was the most attractive feature of the place, and recovery was approved, though one of the judges dissented. These cases, as explained by Johnston, C. J., in Tavis *v.* Kansas City, 89 Kan. 547, 132 Pac. 185, are not out of harmony with the rule as applied to natural bodies of water.